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January 24, 2018

The Honorable Pierre N. Leval  
United States Court of Appeals for the Second Circuit  
40 Foley Square  
New York, NY 10007

Re: *Delaware v. Arkansas, et al.*, Nos. 22O145/22O146

Judge Leval:

This letter is sent on behalf of the 28 states in 22O146 and the State of Wisconsin in response to the discovery requests included in Delaware's January 19, 2018 letter. The Commonwealth of Pennsylvania responds separately.

The sole question presented in the liability phase of this case is whether "Official Checks" sold by MoneyGram Payment Systems, Inc. are subject to the Federal Disposition Act, 12 U.S.C. 2501, *et seq.* Based on the objective characteristics of the products, did Congress intend to prevent the inequity that occurs when hundreds of millions of dollars in unclaimed Official Checks are remitted to Delaware regardless of where the products were purchased?

As Delaware conceded in its January 19, 2018 letter, that question requires answering whether Official Checks are money orders or similar written instruments. That answer is based largely on information in MoneyGram's possession, custody, or control. Indeed, based on the preliminary discovery received from MoneyGram, the contours of the case are becoming clear. The initial document production indicates that MoneyGram sells four types of products under its Official Check program. The first is labeled by MoneyGram as a "Cashier's Check" and requires the banks selling the instrument—rather than MoneyGram—to remit amounts that go unclaimed to the proper state. Likewise, there is no dispute about the escheatment of the Official Check product labeled by MoneyGram as an "Agent Check Money Order." MoneyGram is responsible for remitting the unclaimed Agent Check Money Orders proceeds. And it appears that MoneyGram has been

escheating that property to the states in which the Agent Check Money Orders were purchased pursuant to the Federal Disposition Act.

That leaves two types of Official Check products subject to this lawsuit—those labeled as “Agent Checks” and those labeled as “Teller’s Checks.” As all parties acknowledged at the June 5, 2017 conference, the labels given to the instruments in question are not controlling. What matters is how the instruments operate. MoneyGram’s documents show those operative details and the instruments’ similarities to Agent Check Money Orders. As will be explained in more detail in appropriate briefing, all three types of Official Checks are within the scope of the Federal Disposition Act and should be remitted to the states of purchase.

It is this narrow legal issue in the liability phase that determines the scope of discovery. Requests must seek information that is relevant to parties’ claims or defenses and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). The scope of discovery is limited when the issue before the court is a pure question of law. *See Brazos Valley Coal. of Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 327 (5th Cir. 2005); *Pfizer Inc. v. Ranbaxy Labs. Ltd.*, 321 F. Supp. 2d 612, 619 (D. Del. 2004).

Recognizing the limited scope of discovery in the liability phase, the Defendant States sent seven targeted requests for production to Delaware. The Defendant States sent 16 more requests for production to MoneyGram. Both Delaware and MoneyGram have responded, and the Defendant States do not take issue with either response at this time. The Defendant States believe that many of the documents that are truly relevant to the liability phase of this case have already been produced. Any additional documents that are requested or produced will be of minimal probative value at best, and the value of those documents must be weighed against the burden of their production.

By contrast, Delaware originally sent 22 requests for production, 17 interrogatories, and one request for admission to the Defendant States. Delaware also sent third-party subpoenas to MoneyGram, a third-party auditor, and another financial service provider, consisting of an additional 61 requests for production. The discovery to the Defendant States included such overly broad and unduly burdensome requests as:

Request No. 2:

All of DEFENDANT STATES' COMMUNICATIONS and DOCUMENTS related to the escheat of negotiable instruments for the RELEVANT TIME.

That would have required 30 different states—with 30 different email and document management systems—to search for, review, and produce every email, holder report, memo, and any other document related to any type of negotiable instrument over a period of thirteen years.

The Defendant States objected to those requests based in large part on the limited role that states have in determining where a holder reports its unclaimed property. A holder remits different types of unclaimed property to different states depending on the holder's view of the characteristics of the unclaimed property and its interpretation of the applicable laws. The laws of the Defendant States place the primary obligation on the holder to determine which state receives the remitted unclaimed property. The structure is similar to the filing of an income tax return, and a state's acceptance of the return does not endorse how the property was reported.

The Defendant States provide some limited guidance to holders in making that determination, and the Defendant States have agreed to produce the official documents, policy statements, and guidance manuals available to holders. Likewise, the Defendant States have agreed to produce documents and communications regarding MoneyGram Official Checks. The Defendant States have made clear, however, that producing such documents is in no way a concession that they are relevant to the issue of statutory construction before the Court.

As a result of the parties' prior discussions, Delaware has revised its requests, and the Defendant States have agreed to provide the identity of the individuals responsible for each state's respective unclaimed property program. Regarding the two bullet points in Delaware's January 19, 2018 request for a pre-motion conference, the Defendant States respond as follows:

- The Defendant States agree to provide Delaware with the names of the entities that escheated official checks, money orders, and other similar written instruments to the Defendant States to the extent that such information is available and not unduly burdensome to obtain. But—as the Defendant States made clear in their January 10, 2018 letter—requesting the identities of all holders who have reported six types of negotiable instruments

to 30 states over the course of 13 years will require identifying thousands of entities. Delaware intends to use that information to conduct third-party discovery on those entities. The Defendant States' concern is that such efforts could quickly become unduly burdensome, particularly in proportion to the single narrow issue currently in front of the Court. The Defendant States may petition the Special Master for relief if Delaware seeks to issue an unreasonable number of third-party discovery requests or to go outside the scope of permissible discovery in this case in some other way.

- Delaware's second request is overly broad, unduly burdensome, vague, and disproportionate given what is truly relevant to the issues before the Court. The request asks that 30 states be ordered to search 30 different email and document systems for any communication related to the escheat of an undefined number of negotiable instruments. As explained above, the states play a limited role in how unclaimed property is classified in its initial reporting. Any individual state agency employee communication regarding the classification of a given instrument does not necessarily constitute the formal, considered, and properly adopted view of the agency or the state. Such a communication is, of course, not binding on the Court and of questionable probative value to what Congress intended by the words in the Federal Disposition Act. The states have already agreed to produce all the official documents, policy statements, and guidance manuals that are provided to holders. It is unclear what Delaware hopes to uncover and why such an onerous search would be helpful in deciding the issue before the Court.

The U.S. Supreme Court granted the Defendant States leave to pursue their claims regarding specific products sold by one discrete company. The relevant inquiry is based on the characteristics of MoneyGram Official Checks. MoneyGram is in possession of the information that explains those characteristics, and MoneyGram has already produced much of that information. The Defendant States have responded to Delaware's reasonable discovery requests. But the Defendant States object to Delaware's overly broad and unduly burdensome demands for information that is of dubious relevance.

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Sincerely,



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*On behalf of the 28 states in 220146 and the State of Wisconsin*

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